IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.393 OF 2004

Municipal Corporation of Greater Mumbai. ... Petitioner

vs.

M/s.Shivshakti Engineers. .... Respondent.

Mr.R.D.Dhanuka with Mr.Pimpale, for Petitioner.

Mr.V.L.Panjuani with C.S. Balsara, for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 23rd August,2005

P.C.:-

1. By this petition, the petitioner challenges the Award made by the sole Arbitrator. The principal challenge is to the jurisdiction of the sole Arbitrator. According to the petitioner, the sole Arbitrator was not really appointed in accordance with the terms of contract between the parties. According to the petitioner, in terms of the arbitration clause between the parties a person should be appointed as an Arbitrator by an agreement between the parties. It is not in dispute

that the Arbitrator who has made the Award claims to have been appointed by consent of the parties. The learned Counsel appearing for the petitioner submits that after the respondent invoking the arbitration clause, it appears that one Mr.B.R.Gole was approached for being appointed as Arbitrator. However, he declined to act as Arbitrator. Therefore, letter dated 22.5.2002 was addressed by the Corporation to the Respondent informing the Respondent about inability of Mr.Gole to be an Arbitrator and had asked the Respondent to suggest another Arbitrator. By communication dated 14.6.2002, the Respondent suggested the name of Mr.S.R.Hosalkar who was on the panel of arbitrator maintained by the Corporation. It appears that on receiving that communication, the Corporation wrote a letter to Mr.S.R.Hosalkar requesting him to give his consent alongwith the terms and conditions on which he is willing to act as an Arbitrator. By letter dated 25.7.2002 Shri.Hosalkar intimated his consent for acting as an Arbitrator but he stated that he will intimate his terms and conditions in the preliminary meeting. The preliminary meeting was held on 5.8.2002. In that meeting the Arbitrator had indicated his terms and conditions as to the fees and charges payable to him. Immediately thereafter, the Petitioner intimated to the Respondent by communication dated 7.9.2002 that terms and conditions indicated by Mr.Hosalkar were to be put for sanction before the higher authorities. By that letter the Respondent was also informed that instead of

Mr.Hosalkar, the matter can be referred to Shri.Devkule who is dealing with the another connected matter, as an Arbitrator. By communication dated 27.9.2002, the Petitioner informed the Respondent that the Petitioner does not agree to the appointment of Mr.Hosalkar and therefore, the Respondent was requested not to proceed further in the matter before Shri.Hosalkar. It appears that thereafter, Mr.Hosalkar, continued to act as Arbitrator. Therefore, an objection was raised to the jurisdiction of the Arbitrator to act as Arbitrator. That objection was decided by Shri.Hosalkar. He has disclosed the reason for rejection of the objection in the Award. The learned Counsel appearing for petitioner submits that the reason that has been given by the learned Arbitrator for holding that he was appointed as Arbitrator by consent of both the parties is that an objection to his continuance was raised only in the written statement filed by the petitioner. The learned Counsel submits that perusal of correspondence between the parties shows that the petitioner did not agree to the appointment of Shri.Hosalkar as Arbitrator as the terms and conditions indicated by Mr.Hosalkar were not acceptable to it. On behalf of the respondent, on the other hand it is submitted that the Corporation had asked Mr.Hosalkar to intimate his consent to act as Arbitrator and also to indicate his terms and conditions. Mr.Hosalkar had intimated to the Corporation that he is willing to act as Arbitrator, but he did not communicate the terms and conditions. Therefore, if

this course was not acceptable to the Corporation, the Corporation should not have attended the preliminary meeting fixed by Shri.Hosalkar. According to the learned Counsel, the conduct of the Corporation of attending the preliminary meeting shows that the Corporation had accepted the appointment of Mr.Hosalkar as Arbitrator. It is further submitted that the Corporation should have intimated to Mr.Hosalkar that the terms and conditions proposed by him are not acceptable to the Corporation and therefore, he cannot act as Arbitrator. It is submitted that the conduct of the Corporation of appearing before the Arbitrator shows that the Corporation had agreed to the appointment of Mr.Hosalkar, as Arbitrator. Apart from hearing the learned Counsel for both the sides, I have also gone through the record. In my opinion, the question whether Mr.Hosalkar was validly appointed as Arbitrator in terms of arbitration agreement between the parties, has to be decided on the basis of correspondence exchanged between the parties. It is an admitted position before me that according to Clause 97 of the Agreement between the parties, a person is to be appointed as Arbitrator by an agreement between the parties. Thus, the appointment of Arbitrator can be made in terms of the agreement if both the parties give their consent for appointment of a person as Arbitrator. By communication dated 22.5.2002, the Corporation had requested the Respondent to communicate the name of a person who could be appointed as an Arbitrator. That letter was

replied to by the Respondent by communication dated 14.6.2002. In that letter the Respondent stated thus:-

> "We hereby suggest the name of Shri.S.R.Hosalkar, Retd. Chief Engineer, BARC, who is on the panel of MCGM as sole Arbitrator in the matter and request you to inform this fact to Shri.S.R.Hosalkar and seek his consent alnonwith the terms and conditions for appointment."

Thus, by this communication the Respondent had asked the Petitioner-Corporation to seek consent of Mr.Hosalkar to act as Arbitrator and also to take from him the terms and conditions on which he is willing to act as Arbitrator. The petitioner-Corporation therefore, had addressed a communication dated 17.7.2002 to Shri.S.R.Hosalkar wherein it stated thus:-

> " You being the arbitrator on the panel of M.C.G.M., your name was included in the list of arbitrators send to the contractors. The contractors have now intimated that they have opted you as an arbitrator for the work under reference and have requested to appoint you the sole arbitrator in the matter.
>
> You are hereby requested to submit your

> consent alongwith the terms and conditions for appointing you as an arbitrator in the matter, at the earliest."

It is thus clear that as required by the Respondent, the Petitioner-Corporation had intimated to Shri.S.R.Hosalkar to communicate his consent alongwith the terms and conditions on which he agrees to act as an Arbitrator, obviously so that the Corporation can consider the terms and conditions and either accept him as Arbitrator or not to accept him as Arbitrator. Therefore, really speaking as both the parties wanted to know the terms and conditions on which Shri.Hosalkar was willing to act as Arbitrator, Shri.Hosalkar should have intimated the terms and conditions to the parties. Such a course of action is also commended by the provisions of sub-section (8) of Section 31 of the Act which empowers the Arbitrator to fix cost of arbitration in case there is no agreement between the parties in that regard. Therefore, if the parties have indicated to the Arbitrator that they want to take decision on the terms and conditions on which the Arbitrator has to be appointed, it was for Mr.Hosalkar to intimate the terms and conditions to the parties. But it appears that he decided to follow a curious course of action. By communication dated 25.7.2002 he gave his consent for appointment as sole arbitrator, but in the said letter he stated thus:-

> "As regards the terms and conditions, the

> same will be discussed and decided at the preliminary meeting which I will hold in the matter as given below."

and he further directed the parties to remain present before him at the preliminary meeting on 5.8.2002. Really speaking, both the parties could have declined to attend the preliminary meeting which was called by Mr.Hosalkar because by that time he was not appointed as Arbitrator and therefore, he was not justified in calling the meeting. But it appears that the parties had chosen to attend the meeting to know the terms and conditions on which Mr.Hosalkar was willing to act as Arbitrator. Accordingly, both the parties attended the preliminary meeting held on 5.8.2002. Perusal of the minutes of that meeting shows that Mr.Hosalkar did not fix his reading fees but only indicated that each party shall deposit Rs.5000/- with him and he will decide the reading fees subsequently. He further decided that he will charge Rs.4000/- as Sitting fees per session of two hours or part thereof, which shall be shared equally by both the parties. He has also fixed his minimum fees at Rs.24,000/- to be paid by each party. He has also given some directions for payment of conveyance allowance to him. It is clear from the correspondence referred to above that so far as the Corporation is concerned, the Corporation was to give its consent for appointing Shri.S.R.Hosalkar as Arbitrator only after knowing the terms and conditions. As the terms and conditions were

disclosed by the Arbitrator on 5.8.2002, the Arbitrator Mr.Hosalkar should have waited for receiving the consent of the Corporation. The correspondence between the parties shows that not only that the Corporation did not accept the terms and conditions indicated by Shri.Hosalkar but the Corporation decided not to accord its consent to the appointment of Shri.Hosalkar. The Corporation had sent a letter dated 7.9.2002 to the Respondent and thereby a request is made to agree on the appointment of Mr.S.T.Deokule as an Arbitrator. Perusal of that letter dated 7.9.2002 which is addressed to the Respondent shows that the Corporation decided not to agree to the appointment of Mr.Hosalkar as Arbitrator. This fact is further clear from the communication dated 27.9.2002 whereby the Corporation requested the Respondent not to proceed further before Shri.Hosalkar. The correspondence between the parties nowhere indicates that the Corporation at any point of time had accepted the terms and conditions put up by Mr.Hosalkar. As in terms of the arbitration agreement between the parties, a person could be appointed as an Arbitrator only by consent of both the parties and as the Corporation had never given its consent by accepting the terms and conditions of Mr.Hosalkar, there is no question of Mr.Hosalkar being validly appointed as Arbitrator. Perusal of the provisions of Section 16 of the Act shows that an objection to the jurisdiction of the Arbitrator can be raised at any time till the submission of statement of defence and party

is not precluded from raising objection to the jurisdiction of the arbitrator merely because he had participated in the appointment of the Arbitrator. Therefore, the alleged delay on the part of the Corporation in raising the objection was not relevant and material for deciding validity of this objection. In my opinion, therefore, the course of conduct adopted by Shri.Hosalkar of not intimating his terms and conditions and instead inviting parties for first preliminary meeting dis-entitles Mr.Hosalkar to act as Arbitrator. If the parties wanted to know the terms and conditions on which he is willing to act as Arbitrator, it was for him to intimate the terms and conditions because he would have become entitled to call meeting of the parties only on his being appointed as Arbitrator. The letter of Corporation was clear that without knowing the terms and conditions on which he is willing to act as arbitrator, the Corporation was not willing to give its consent for his appointment as Arbitrator. The conduct of Shri.Hosalkar shows that he wanted to force himself on the parties as Arbitrator. Taking overall view of the matter therefore, in my opinion, it cannot be said that Shri.Hosalkar, who has made the Award which is impugned in the Petition, was appointed as Arbitrator in terms of the Arbitration Agreement and therefore, he had no jurisdiction to make the Award. The Award therefore, is liable to be set aside. In the result therefore, the petition succeeds and is allowed. The Award impugned in the petition is set aside. The respondent is directed to pay cost of

this petition to the petitioner as incurred by the petitioner.

In view of the findings that have been recorded by me above, it is not necessary to consider the other issues in relation to the validity of the Award.